LIM CHIN AIK v. REGINA

[P. C. (Viscount Radcliffe, Lord Evershed and Lord Devlin) November 29, 1962]

[Privy Council Appeal No. 1 of 1962]

Immigration — Control of entry — Prohibition order made against person living in Federation regularly visiting family in Singapore — Order not brought to notice of accused — Lack of provision for publication of order of any kind as made in present case — Arrest and prosecution of accused — Whether mens rea essential in such cases — Singapore Immigration Ordinance (Cap. 102), ss.6, 9 and 57.

The appellant who was born in China about the year 1900 after living in Singapore with his wives and children left Singapore in 1954 in circumstances apparently of some suspicion. At the beginning of 1955 he was living in the Federation of Malaya and he visited his family daily at Singapore, returning each night to the Federation. On the 28th May, 1959 the Minister acting under section 9 of the Ordinance made an order prohibiting the appellant from entering Singapore but there was no evidence at the trial from which it could properly be inferred that the order had in fact come to the notice or attention of the appellant. At sometime more than ten days before 29th June, 1959 the appellant began to live in Singapore. On 29th June the appellant was arrested and was duly charged under section 6(2) of the Immigration Ordinance and convicted on 27th August, 1959 by the Magistrate. On the High Court dismissing his appeal without stating any reasons he appealed by special leave to the Board. It was argued for the appellant in the absence of any evidence of the guilty intent of the appellant was fatal to the validity of his conviction (ii) if *mens rea* was an essential ingredient of an offence under section 6(3) of the Ordinance, then the onus of proof of its existence lay upon the prosecution.

Held: the presumption is that *mens rea* or evil intention or knowledge of the wrongfulness of the act is an essential ingredient of every offence but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered. Observations of Wright J. in *Sherras* v. *de Rutzen* (4) and Lord Du Parcq in *Srinivas Mall Bairolia* v. *King Emperor* (5) followed. In this case the application of the rule that *mens rea* is an essential ingredient of every offence has not been ousted by the terms or subject-matter of the Ordinance and the appellant's conviction cannot stand.

Observation on sections 6 and 9 of the Immigration Ordinance.

Cases referred to:—

(1) *Nicholls* v. *Hall* L.R. 8 C.P. 322.
(2) *Cundy* v. *Le Cocq* L.R. 13 Q.B.D. 230.
(3) *Reg.* v. *Cugullere* [1961] 1 W.L.R. 858.
(4) *Sherras* v. *de Rutzen* [1895] 1 Q.B. 918.
(5) *Srinivas Mall Bairolia* v. *King-Emperor* I.L.R. 26 Patna 460.
(6) *Brend* v. *Wood* 62 T.L.R. 462.
(7) *Hobbs* v. *Winchester Corporation* [1910] 2 K.B. 471.
(8) *Reynolds* v. *G.H. Austin & Sons Ltd.* [1951] 2 K.B. 135.
(9) *James & Son Ltd.* v. *Smee* [1955] 1 Q.B. 78.
(10) *R.* v. *St. Margarets Trust Ltd.* [1958] 1 W.L.R. 522.

PRIVY COUNCIL APPEAL.

E. F. N. Gratiaen, Q.C. (*Dick Taverne* with him) for the appellant.

J. G. Le Quesne, Q.C. (*M. Heald* with him) for the respondent.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by,

Lord Evershed: The appellant, Lim Chin Aik (who appears to have been known by several other names but to whom Their Lordships will hereafter refer as "the appellant") has appealed to the Board by special leave from the dismissal on the 24th February, 1960, by the High Court of Singapore of his appeal against conviction by a magistrate on the 27th August, 1959, for an offence under section 6 of the Immigration Ordinance of 1952 (c.102) of the State of Singapore (as later amended) and the sentence then imposed of a fine of $1,250 or three months' imprisonment. The relevant facts fall within a small compass but the point involved in the appeal is one, as Their Lordpships think, of no little importance.

The appellant appears to have been born in China about the year 1900. It is unnecessary to relate his history beyond stating that, after living in Singapore with his wives and children, he left Singapore in 1954 in circumstances apparently of some suspicion. At the beginning of 1959 he was living in the Federation of Malaya. He then began to visit Singapore and his family daily, returning each night to the Federation. At some time, according to a statement made by the appellant to the police, "more than ten days before the 29th June, 1959" the appellant began to live in Singapore with his wives and children. On the 29th June the appellant was discovered by a police officer of Singapore who was making a search for narcotics and he was then arrested.

The appellant was first charged on the 1st July, 1959, with having entered the State of Singapore about the 17th May, 1959, without a valid permit, thereby contravening section 6(1) of the Immigration Ordinance. At the trial of the appellant this charge was abandoned by the prosecution and it need not therefore further be considered.

A second charge was dated the 15th August, 1959 (two days in fact before the appellant's trial). This charge was in the following terms:

> ". . . you . . . having entered Singapore from the Federation of Malaya in May, 1959, did remain therein whilst prohibited by an order made by the Minister under section 9 prohibiting you from entering Singapore and have thereby contravened section 6(2) of the Immigration Ordinance, an offence under section 6(3) punishable under section 57 thereof."

Their Lordships will refer now to the relevant terms of the Ordinance of 1952 (as amended by the Amendment Ordinance of 1959 (No. 22) which came into operation on the 1st May, 1959). Section 9 sub-section (1) of the (amended) Ordinance so far as relevant is in the following terms:

> "9. — (1) The Minister may, by order —
>
> (a) where he deems it expedient to do so in the interests of public security or by reason of any economic, industrial, social, educational or other conditions in Malaya —
>
> (i) prohibit, either for a stated period or permanently, the entry or re-entry into the Colony of any person or class of persons;"

Sub-section (3) of the same section states —

" (3) — (*a*) Every order made under subsection (1) of this section shall unless it be otherwise provided in such order take effect and come into operation on the date on which it is made.

(*b*) Every order made under subsection (1) of this section which relates to a class of persons shall be published in the *Gazette* and, except an order made in the interests of public security, shall be presented to the Legislative Assembly as soon as may be after publication and if a resolution is passed pursuant to a motion . . . annulling the order or any part thereof as from a specified date, such order or such part thereof, as the case may be, shall thereupon become void as from such date but without prejudice to the validity of anything previously done thereunder or to the making of a new order."

It will be noticed that in the case of an order directed to a single person as distinct from one directed to a class of persons there is not in the section (nor is there elsewhere in the Ordinance) any provision for publishing the order or for otherwise bringing it (actually or notionally) to the attention of the person named.

By section 6 sub-section (2) of the (amended) Ordinance it is provided —

" (2) It shall not be lawful for any person other than a citizen of Singapore to enter Singapore from the Federation or having entered Singapore from the Federation to remain in Singapore if —

(*b*) such person has been prohibited by order made under section 9 of this Ordinance from entering Singapore;"

By sub-section (3) of the same section it is provided that —

" Any person who contravenes the provisions of sub-section . . . (2) of this section shall be guilty of an offence against this Ordinance."

Finally, section 57 of the Ordinance provides that any person guilty of an offence under the Ordinance for which no special penalty is provided shall be liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding $2,000 or to both such imprisonment and fine.

It is not in dispute that pursuant to section 9 of the Ordinance above recited the Minister of Labour and Welfare did make, on the 28th May, 1959, an order prohibiting the appellant from entering Singapore.

At the trail (which as already stated took place on the 17th August, 1959) it was proved by the Deputy Assistant Controller of Immigration that the Minister's order was received by him on the day on which it was made; but there was no evidence of what was done with the order thereafter and no evidence of any step having been taken by way of publication or otherwise so as to bring the order to the attention of the appellant — or indeed of anyone else.

The appellant at his trial did not personally give any evidence at all.

It follows from the above recital of facts that there was at the trial no evidence at all from which it could be properly inferred that the order had in fact come to the notice or attention of the appellant. It was therefore said on the appellant's behalf before the Magistrate that, since there was no evidence of guilty intent on his part and that since such a guilty intent on general principles must be an ingredient of any criminal offence, it therefore followed that no offence had been proved against the appellant under the Ordinance. This plea was rejected by the Magistrate who, basing himself upon the terms of the relevant section of the Ordinance, held that there was in this case no need for any evidence of *mens rea*.

The appellant then appealed to the High Court of Singapore but that Court dismissed his appeal without stating any reasons for the dismissal.

Mr. Gratiaen who appeared for the appellant before Their Lordships took as his first point the contention which had been rejected in the Courts below, namely, that the absence of any evidence of the guilty intent of the appellant was fatal to the validity of his conviction. He argued, secondly, that if, as he contended, *mens rea* was an essential ingredient of an offence under section 6(3) of the Ordinance, then the onus of proof of its existence lay upon the prosecution. Mr. Le Quesne for the respondent challenged the first of Mr. Gratiaen's submissions but conceded the validity of his second point upon the hypothesis that the first was well founded. In the event therefore, it is with the question whether a guilty mind is a necessary requisite for the establishment of an offence under the relevant section that Their Lordships are alone concerned and, as Their Lordships have already observed, the question is one, as they venture to think, of substance and importance.

It is convenient to dispose at once of Mr. Le Quesne's first suggested answer to this question which was an invocation of the precept that ignorance of the law is no excuse. It was said on the respondent's part that the order made by the Minister under the powers conferred by section 9 of the Ordinance was an instance of the exercise of delegated legislation and therefore that the order, once made, became part of the law of Singapore of which ignorance could provide no excuse upon a charge of contravention of the section. Their Lordships are unable to accept this contention. In Their Lordships' opinion, even if the making of the order by the Minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do not concede), the maxim cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision, corresponding, for example, to that contained in section 3(2) of the English Statutory Instruments Act of 1946, for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate enquiry to find out what "the law"

is. In this connection it is to be observed that a distinction is drawn in the Ordinance itself between an order directed to a particular individual on the one hand and an order directed to a class of persons on the other; for sub-section (3) *(b)* of section 9 provides in the latter case both for publication in the *Gazette* and presentation to the Legislative Assembly.

Their Lordships return accordingly to the main question. That proof of the existence of a guilty intent is an essential ingredient of a crime at common law is not at all in doubt. The problem is of the extent to which the same rule is applicable in the case of offences created and defined by the statute or statutory instrument. Their Lordships were very properly referred to a number of cases including the often-cited *Nicholls* v. *Hall*[1] and *Cundy* v. *Le Cocq*[2] and covering a considerable period ending with the decision last year of the Court of Criminal Appeal in *Reg.* v. *Cugullere.*[3] As was observed by Wright, J. at the beginning of his judgment in the case of *Sherras* v. *Rutzen*[4] to which Their Lordships will presently make further reference, the difficulty of the problem is enhanced by the fact that many of the cases are not easy to reconcile. Thus it has been held that a licensee of a public house commits an offence under the licensing legislation of serving alcoholic liquor to a drunken man even though he was unaware of the customer's condition (*Cundy* v. *Le Cocq*, *supra*): but that a licensee does not commit the offence under the same legislation of serving drinks to a police constable on duty if he reasonably supposed that the constable was in fact off duty (see *Sherras's* case above mentioned): and in the latest case above cited the Court of Criminal Appeal held that the terms of section 1 of the Prevention of Crimes Act, 1953 "a person who without lawful authority or reasonable excuse, proof whereof shall lie on him, has with him in a public place any offensive weapon shall be guilty of an offence" must be read as if the word "knowingly" were written before the word "has".

Mr. Gratiaen founded his argument upon the formulation of the problem contained in the judgment of Wright, J. in *Sherras's* case at page 921 of the Report. The language of that learned and experienced Judge was as follows:

> "There is a presumption that *mens rea* or evil intention or knowledge of the wrongfulness of the act is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the Statute creating the offence or by the subject-matter with which it deals and both must be considered."

It is to be observed that in that case the Court held the presumption not to be displaced even though the word "knowingly" which was not found in the sub-section involved in the case did appear in another sub-section of the same section. Their Lordships add that the circumstance last mentioned was regarded by Day, J. in his judgment in the same case as shifting the onus of proof to the defendant (which onus the learned Judge held to have been discharged). The question of onus does not, as already stated, arise in the present case. Their Lordships think it right, however, to say that they should not be thought to assent to Day, J's. proposition — and they have in this respect noted that Mr. Le Quesne has not so contended.

Their Lordships accept as correct the formulation cited from the judgment of Wright J. They are fortified in that view by the fact that such formulation as expressly accepted by Lord du Parcq in delivering the judgment of the Board in the case in 1947 of *Srinivas Mall Bairolia* v. *King-Emperor*[5] — a case which unfortunately has not found its way into the Law Reports. That was a case in which one of the appellants had been charged with an offence under the rules made by virtue of the Defence of India Act, 1939, consisting of the sale of salt at prices exceeding those prescribed under the rules, the sales having in fact been made without that appellant's knowledge by one of his servants. The Indian High Court had held the appellant to be none-the-less liable upon the terms of the rules; but the Board rejected the view of the High Court. Lord du Parcq, after citing with approval the judgment already quoted of Wright, J., also adopted the language of Lord Goddard, C.J. in the case of *Brend* v. *Wood*[6]: "It is in my opinion of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind".

The adoption of these formulations of principle does not however dispose of the matter. Mr. Le Quesne, indeed, as Their Lordships understood, did not challenge the formulations. But the difficulty remains of their application. What should be the proper inferences to be drawn from the language of the statute or statutory instrument under review — in this case of sections 6 and 9 of the Immigration Ordinance? More difficult perhaps still, what are the inferences to be drawn in a given case from the "subject-matter with which [the statute or statutory instrument] deals?"

Where the subject-matter of the statute is the regulation for the public welfare of a particular activity — statutes regulating the sale of food and drink are to be found among the earliest examples — it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*. Thus sellers of meat may be made responsible for seeing that the meat is fit for human consumption and it is no answer for them to say that they were not aware that it was polluted. If that were a satisfactory answer, then as Kennedy, L.J. pointed out in

Hobbs v. *Winchester Corporation*[7] the distribution of bad meat (and its far-reaching consequences) would not be effectively prevented. So a publican may be made responsible for observing the condition of his customers, *Cundy* v. *Le Cocq, supra.*

But it is not enough in Their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalizing him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim. This principle has been expressed and applied in *Reynolds* v. *G. H. Austin & Sons Ltd.*[8] and *James & Son Ltd.* v. *Smee*[9]. Their Lordships prefer it to the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. This latter view can perhaps be supported to some extent by the dicta of Kennedy, L.J. in *Hobbs* v. *Winchester Corporation, supra,* and of Donovan, J. in *R.* v. *St. Margarets Trust Ltd.*[10]. But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, Their Lordships cannot, with respect, suppose that it is envisaged by the legislature as a way of dealing with offenders generally. Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, Their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended.

Their Lordships apply these general observations to the Ordinance in the present case. The subject-matter, the control of immigration, is not one in which the presumption of strict liability has generally been made. Nevertheless, if the Courts of Singapore were of the view that unrestricted immigration is a social evil which it is the object of the Ordinance to control most rigorously, Their Lordships would hesitate to disagree. That is a matter peculiarly within the cognizance of the local Courts. But Mr. Le Quesne was unable to point to anything that the appellant could possibly have done so as to ensure that he complied with the regulations. It was not, for example, suggested that it would be practicable for him to make continuous inquiry to see whether an order had been made against him. Clearly one of the objects of the Ordinance is the expulsion of prohibited persons from Singapore, but there is nothing that a man can do about it if, before the commission of the offence, there is no practical or sensible way in which he can ascertain whether he is a prohibited person or not.

Mr. Le Quesne, therefore, relied chiefly on the text of the Ordinance and Their Lordships return, accordingly, to the language of the two material sections. It is to be observed that the Board is here concerned with one who is said (within the terms of section 6(3)) to have "contravened" the sub-section by "remaining" in Singapore (after having entered) when he had been "prohibited" from entering by an "order" made by the Ministry containing such prohibition. It seems to Their Lordships that, where a man is said to have contravened an order or an order of prohibition, the commonsense of the language presumes that he was aware of the order before he can be said to have contravened it. Their Lordships realize that this statement is something of an oversimplification when applied to the present case: for the "contravention" alleged is of the unlawful act, prescribed by sub-section (2) of the section, of remaining in Singapore after the date of the order of prohibition. None-theless it is Their Lordships' view that, applying the test of ordinary sense to the language used, the notion of contravention here alleged is more consistent with the assumption that the person charged had knowledge of the order than the converse. But such a conclusion is in Their Lordships view much reinforced by the use of the word "remains" in its context. It is to be observed that if the respondent is right a man could lawfully enter Singapore and could thereafter lawfully remain in Singapore until the moment when an order of prohibition against his entering was made; that then, instanter, his purely passive conduct in remaining — that is, the mere continuance, quite unchanged, of his previous behaviour, hitherto perfectly lawful — would become criminal. These considerations bring Their Lordships clearly to the conclusion that the sense of the language here in question requires for the commission of a crime thereunder *mens rea* as a constituent of such crime; or at least that there is nothing in the language used which suffices to exclude the ordinary presumption. Their Lordships do not forget the emphasis placed by Mr. Le Quesne on the fact that the word "knowingly" or the phrases "without reasonable cause" or "without reasonable excuse" are found in various sections of the Ordinance (as amended) but find no place in the section now under consideration — see for example sections 16(4), 18(4), 19(2), 29, 31(2), 41(2) and 56*(d)* and *(e)* of the Ordinance. In Their Lordships' view the absence of such a word or phrase in the relevant section is not sufficient in the present case to prevail against the conclusion which the language as a whole suggests. In the

first place, it is to be noted that to have inserted such words as "knowingly" or "without lawful excuse" in the relevant part of section 6(3) of the Act would in any case not have been sensible. Further, in all the various instances where the word or phrase is used in the other sections of the Ordinance before-mentioned the use is with reference to the doing of some specific act or the failure to do some specific act as distinct from the mere passive continuance of behaviour theretofore perfectly lawful. Finally, Their Lordships are mindful that in the *Sherras* case itself the fact that the word "knowingly" was not found in the sub-section under consideration by the court but was found in another sub-section of the same section was not there regarded as sufficient to displace the ordinary rule.

Their Lordships have accordingly reached the clear conclusion, with all respect to the view taken in the courts below, that the application of the rule that *mens rea* is an essential ingredient in every offence has not in the present case been ousted by the terms or subject-matter of the Ordinance and that the appellant's conviction and sentence cannot stand.

Their Lordships will accordingly humbly advise Her Majesty that this appeal ought to be allowed and the conviction of the appellant and the sentence imposed upon him ought to be quashed. Their Lordships also are of opinion that the respondent ought to pay the costs of the appellant's appeal to the Board.

Appeal allowed.

Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

ANGLO ORIENTAL PLANTATIONS LTD. v. RAJAMMAH

[A.C.J. (Gill J.) December 18, 1962]

[K.L. — Civil Appeal No. 9 of 1962]

Workmen's compensation — Personal injury — Diminution of earning power — Continuing incapacity — Injury to the eye — Meaning of "Loss of sight" — Workmen's Compensation Ordinance, 1952.

Damages — Eye — Injury to — Continuing incapacity — Meaning of "loss of sight" — Workmen's Compensation Ordinance, 1952, First Schedule.

On November 13, 1960, whilst the respondent was tapping rubber, a bark shaving struck her right eye as a result of which she suffered partial permanent disability in the form of partial loss of vision amounting to 10% loss of unimpaired physical capacity. On being discharged from hospital, the respondent resumed work with the appellants and continued to earn as much as she was earning before the accident. On an application to the President, Sessions Court, as arbitrator under section 30 of the Workmen's Compensation Ordinance, the learned President found that her earning capacity had been reduced by 10% on the ground that if the respondent lost her present employment her opportunities for obtaining alternative employment as a tapper or other manual jobs would be narrowed to the extent proportionate to her loss of unimpaired physical capacity. The appellants appealed on a certificate under section 39 of the Workmen's Compensation Ordinance, 1952.

Held: (1) in respect of any injury lesser than an injury resulting in blindness, the workman must prove that it resulted in reduction of his earning capacity in every employment which he was able to undertake at the time of the accident;

(2) the respondent has failed to show that her earning capacity in every employment which she was able to undertake at the time of the accident had been reduced.

Cases referred to:—

(1) *Cardiff Corporation* v. *Hall* [1911] 1 K.B. 1009, 1026.

(2) *Allen* v. *Tinsley Park Collieries Ltd.* (1944) 37 B.W.C.C. 28, 31.

(3) *Hawkins* v. *Powells Tillary Steam Coal Co. Ltd.* [1911] 1 K.B. 988, 996.

CIVIL APPEAL.

M. Shanker for the appellant.

Respondent in person.

Gill J.: This is an appeal from an award dated the 23rd May, 1962 by the President, Sessions Court, Klang, sitting as Arbitrator under the Workmen's Compensation Ordinance, 1952, whereby an order was made for the payment to the respondent of a lump sum of $506.59 for an injury to her right eye arising out of and in the course of her employment with the appellants and resulting in a partial disablement of a permanent nature.

A brief history of the proceedings leading up to the reference of the matter to the Arbitrator is as follows. The respondent was employed as a rubber tapper on Golconda Estate, Kapar. On 13th November, 1960, whilst she was tapping, a bark shaving struck her right eye as a result of which she was admitted to the Kapar Group Hospital as an in-patient and then transferred to the General Hospital, Kuala Lumpur. On being discharged from the Kuala Lumpur Hospital after about ten to fifteen days she resumed work as a tapper on or about the 24th December, 1960, from which date she continued to receive her wages based on a daily wage plus an output factor. She lost some of her vision in her right eye but admittedly her efficiency as a tapper had not decreased and her earnings after the accident were the same as prior to the accident. According to a certificate issued by the Ophthalmologist, General Hospital, Kuala Lumpur, on 21st December, 1960, the respondent suffered a scar on the cornea of her right eye with defect of vision and she sustained the following degree of disablement as a result of the accident:

(i) Total temporary disablement estimated to last from date of injury to 22nd December, 1960.

(ii) Partial permanent disablement resulting in partial loss of vision amounting to 10% loss of unimpaired physical capacity.

The appellants by their letter dated 17th November, 1960, reported the accident to the Assistant Commissioner for Labour, Port Swettenham, who, on 16th January, 1961, wrote to the appellants to say that the injured workwoman had sustained permanent partial disablement and that she was entitled to a compensation of $84 for temporary disablement and $506.59 for permanent disablement.